

REMARKS

In the Office Action, claims 1 - 11 and 13 - 75 were noted as pending in the application, with claims 45 - 59 having been withdrawn from consideration, and all remaining claims, namely claims 1 - 11, 13 - 44, and 60 - 75, were rejected. By this amendment, claims 1, 20, 60, 64, 73, 74, and 75 have been amended. Thus, claims 1 - 11, 13 - 44, and 60 - 75 are under examination in the application. The rejections of the Office Action are traversed below.

Objection to the Title

In item 4, on page 3 of the Office Action, the title of the application is objected to as not being descriptive. A proposed title of "System and Method for Recommending Actions to Improve Retail Store Performance Based on The Analysis of Employee and Store Performance Data" has been suggested in the Office Action. The Applicants thank the Examiner for the proposed title of the claimed invention but respectfully submit that the proposed title is too limiting for the coverage afforded by the claims. The title is being changed herein to "System and Method for Determining Recommended Action Based on Measuring and Analyzing Store and Employee Data." Support for the amended title can be found in the specification at least at page 2, line 17 - page 3, line 9. Withdrawal of this objection is respectfully requested.

Rejection of Claims 11, 19, 37, 63, and 69 under 35 USC § 112

In item 6, on pages 3 - 4 of the Office Action, claims 11, 19, 37, 63, and 69 were rejected under 35 USC § 112, first paragraph, as failing the enablement requirement. This rejection is respectfully traversed. 35 USC § 112, first paragraph, requires that the specification contain a written description of the invention and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art of the invention to make and use the same. The Applicants respectfully submit that the specification as filed sufficiently discloses the subject matter of claims 11, 19, 37, 63, and 69, as those claims pertain to staffing profiles, optimal staffing levels, and optimal combination/aggregation of employees based on performance data. See specification at page 16, lines 1 - 6; page 21, line 20 - page 22, line 8. Withdrawal of this rejection is respectfully requested.

Rejection of Claims 1 - 2, 13 - 27, 38, 41 - 44, and 73 - 75 under 35 USC § 102

In item 8, on pages 5 - 14 of the Office Action, claims 1 - 1, 13 - 27, 38, 41 - 44, and 73 - 75 were rejected under 35 USC § 102(b) as being anticipated by “Winning Retail: A Self Assessment and Instructional Guide for Independent Retailers.” This rejection is respectfully traversed.

The Claimed Invention

Exemplary embodiments of the Applicants' invention are directed to a computer-implemented method and system for measuring and analyzing store performance data. The system and method include collecting transactional data of store activity, analyzing the collected data to compute an aggregate synopsis of performance of a subject under observation, and hypothesizing using the aggregate synopsis to develop a hypothesis for store improvement, the hypothesis determining at least one of a plurality of recommended actions. The recommended actions are applied to the subject under consideration, and a change in store performance is measured as a result of applying the recommended actions. Specification at page 2, lines 17 - 27.

The Winning Retail Reference

The Winning Retail reference discloses a multi-chapter document, with chapters 1 (Retailing Strategy), 7 (Employee Development), 8 (Sales Management), 11 (Performance Evaluation), 12 (Computerization) being relied upon by the Office Action to reject the claims herein.

The Winning Retail Reference is Not Prior Art Under 35 USC § 102(b) to this Application

The present application was filed February 21, 2002, with priority under 35 USC § 119(e) to provisional application no. 60/270,563, filed February 21, 2001. Accordingly, a prior art reference under 35 USC § 102(b) must be a publication printed on or before February 21, 2000 and must disclose every element recited in the claims.

The Applicants respectfully submit that the Winning Reference is not a publication printed prior to February 21, 2000. The supplied Winning Reference is not, in fact, a single publication, but instead an undated and untitled collection of 5 chapters from some undisclosed reference, combined with a single front page which is clearly denoted as "Page 1 of 1" and is also clearly dated as "9/5/07." The front page includes an Internet address, which directs the browser to a document published in 2003. There is also a date of "1997" on the front page, but absolutely no evidence that the "1997" is somehow associated with the 5 selected chapters that follow the 9/5/07 front page. In the absence of the necessary evidence that clearly shows the Winning Reference to have been published prior to February 21, 2000, withdrawal of this reference and accordingly, the rejections that rely on it, is respectfully requested.

The Claimed Invention is Patentably Distinguishable Over the Winning Retail Reference, Notwithstanding Winning Retail's Lack of Standing as Prior Art

The Applicants' claimed invention is directed to a computer-implemented method and system for measuring and analyzing store performance data. Collected store data is analyzed to compute a synopsis of the performance of a subject, such as a store employee, under observation. An improvement hypothesis is developed which determines at least one recommended action, and the recommended action(s) is applied to the subject. A change in store performance as a result of the subject applying the recommended action(s) is then measured. In this iterative process, increased performance and revenue can be identified in response to the applied recommended actions. In particular, and reciting claim 1, this system and method include:

- collecting transaction data of store sales activity, utilizing a plurality of available data sources, the data comprising two or more of field performance data, external data, legacy data, and training data, and including customer visit count data, the collected transaction data being indicative of store performance factors;

- analyzing the collected transaction data to compute an aggregate synopsis of performance of a subject under observation;

- hypothesizing using the aggregate synopsis, said hypothesizing developing a hypothesis for store improvement, the hypothesis determining at least one of a plurality of recommended actions;

- applying the determined recommended actions to the subject under observation;
- and

measuring a change in the store performance as a result of the subject under observation applying the determined recommended actions.

The Office Action relies on the Winning Retail reference as allegedly disclosing each of the elements recited in claim 1. However, a comparison of the cited sections of Winning Retail against the elements and features recited in claim 1 demonstrate the deficiencies of the Winning Retail as an alleged anticipatory reference to these claims. The present application discloses and claims a computer-implemented system and method for analyzing collected store transaction data to compute an aggregate synopsis of performance of a subject under observation. Winning Retail merely discusses tracking sales information, such as sales per hour, average sale, and items per sale (Ch. 8, page 6); examining and averaging daily and weekly store and employee performance (Ch. 8, pages 6 - 8); setting employee performance goals (Ch. 8, page 10); and generating statistics and reports (Ch. 11, pages 10 - 27). Many of these retail practices are presented in the background of the present application at page 1, line 8 - page 2, line 14. In Winning Retail, individual employee performance is manually written, summarized, and posted where everyone can see it, by the employees themselves (Ch. 8, pages 11-13). A multitude of reports are shown in Chapters 11 and 12, but nowhere in the Winning Retail is there a disclosure of "analyzing the collected transaction data to compute an aggregate synopsis of performance of a subject under observation." Furthermore, while Winning Retail discusses various performance goals for employees, such as increasing sales (Ch. 8, pages 7 - 15), it is completely silent regarding how to take a computed "aggregate synopsis of performance" of an employee and "hypothesiz[e] using the aggregate synopsis, said hypothesizing developing a hypothesis for store improvement, the hypothesis determining at least one of a plurality of recommended actions." For example, the Office Action cites to Ch. 8, page 6, 1st par of col. 1 as allegedly disclosing this feature. However, this paragraph points out:

Everyone must clearly understand the consequences of not achieving minimum expectations. This is not an exercise is (sic) developing an aptitude for terminating employees, but rather an opportunity to discover who is falling short on performance, before it is too late. Once you discover who isn't meeting expectations, you have the chance to devise a coaching plan that may include training, re-scheduling, etc.

This portion of Winning Retail merely notes that once a retailer finds out who is under-performing, he or she has a chance to develop a coaching plan. Nothing is disclosed nor enabled regarding “developing a hypothesis for store improvement” based on the “aggregate synopsis” and expressly “determining at least one of a plurality of recommended actions.”

Further, the Office Action fails to cite where the Winning Retail reference discloses the “hypothesizing . . .” element of claim 1, contrary to the requirements of 35 USC § 132, 37 CFR § 1.104(c); MPEP § 706. Instead, the Office Action takes the inexplicable position on pages 9 - 10 that “hypothesizing . . .” is merely a label representing “non-functional descriptive material.” As support for this position, the Office Action cites to *In re Gulack*, 703 F.2d 1381 (Fed. Cir. 1983); *In re Lowry*, 32 F.3d 1579, 32 USPQ2d 1031 (Fed. Cir. 1994); and MPEP § 2106. However, *In re Gulack*, and the portions of MPEP §§ 2106, 2112.02 citing *In re Gulack*, apply only to product claims and stand for the proposition that a product is not patentable when the only difference between the claimed product and the prior art product is printed material that is not functionally related to the product. *See In re Gulack* at 1385. The Office Action has not asserted that the only difference between any product or apparatus claims recited herein and the Winning Retail reference is some printed material, so the holding in *Gulack* does not appear to be relevant to the facts of this case. However, the court in *Gulack* further asserted that, such printed material cannot be ignored, as the Examiner in *Gulack* did, and must be considered, as the court did in reversing the rejection in *Gulack*. Applying this dicta to the present facts would lead to the instruction that the “hypothesizing . . .” feature “must be considered” as a claimed element of the present application. *Gulack* at 1385. *In re Lowry* stands for the same proposition at 32 USPQ2d 1034 that the “Patent and Trademark Office (PTO) must consider all claim limitations when determining patentability of an invention over the prior art,” which has not been done in the present Office Action.

On page 6, the Office Action attempts to rewrite the claim language by changing “hypothesizing” to “developing” in an impermissible hindsight attempt to convert the express language of the claims to the disclosure of the Winning Retail reference. Notwithstanding this attempt to “label” the claim language, the fact exists that Winning Retail is completely silent regarding the “hypothesizing . . .” feature recited in claim 1.

As regards the claimed feature of “measuring a change in the store performance as a result of the subject under observation applying the determined recommended actions,” the Office Action cites to the figure shown on page 4 of Ch. 1 of Winning Retail and pages 7 - 8 of Ch. 8. However, the figure of Ch. 1 merely discloses the step of “Implement Monitor & Evaluate.” Pages 7 - 8 of Ch. 8 are consistent with this activity by encouraging the retailer to daily and weekly track such indicators as staff performance, pricing practices, inventory selection, marketing message, store layout, etc. and calculate monthly and periodic averages. In contrast to merely monitoring retail activity that may or may not be related to any changes, the present claimed invention expressly measures a change in store performance as a result of the subject under observation who has applied the determined recommended actions. Winning Retail discloses no such feature.

Claims 20 and 73 - 75 are directed to subject matter similar to the invention recited in claim 1 but in terms of a computer system, a computer program product, and a computer data signal; and the rejection of claims 20 and 73 - 75 are traversed for the same reasons as presented above regarding claim 1.

It is respectfully submitted that Winning Retail fails to disclose each of the features recited in independent claims 1, 20, and 73 - 75; and, therefore, Winning Retail cannot reasonably be said to anticipate Applicants' claimed invention. Accordingly, for this additional reason, claims 1, 20, and 73 - 73 are believed to be patentably distinguishable over the Winning Retail document, and it is respectfully requested that the rejection of claims 1, 20, and 73 - 75 be withdrawn.

Claims 2 and 13 - 19 depend from claim 1 and include all the features of claim 1 plus additional features which are not taught or suggested by the Winning Retail document. For example, claim 18 specifies that the hypothesizing further comprises hypothesizing business scenarios and the recommended actions comprise strategies to improve business operations and staffing profiles for increased sales, which is neither taught nor suggested by Winning Retail. Therefore, for at least this reason and the reasons set forth above with respect to claim 1, it is submitted that claims 2 and 13 - 19 patentably distinguish over the Winning Retail document, and withdrawal of the rejection of claims 2 and 13 - 19 is respectfully requested.

Claims 21 - 27, 38, and 41 - 44 depend from claim 20 and include all the features of claim 20 plus additional features which are not taught or suggested by the Winning Retail document. For example, claim 25 specifies a plurality of transactional data systems operable to gather the transactional data, which is neither taught nor suggested by Winning Retail. The Office Action cites to Ch. 12 as allegedly teaching this feature, but the cited portion of Ch. 12 discloses only a point of sale system, an inventory system, and various reports, not the claimed plurality of systems for gathering transactional data, where the transactional data has been recited in the base claim as being data of store sales activity from such data sources as field performance data, external data, legacy data, and training data. Therefore, for at least this reason and the reasons set forth above with respect to claim 20, it is submitted that claims 21 - 27, 38, and 41 - 44 patentably distinguish over the Winning Retail document, and withdrawal of the rejection of claims 21 - 27, 38, and 41 - 44 is respectfully requested.

Rejection of Claims 3 - 11, 19, 28 - 37, 39 - 40, and 60 - 72 under 35 USC § 103

In item 10, on pages 15 - 34 of the Office Action, claims 3 - 11, 19, 28 - 37, 39 - 40, and 60 - 72 were rejected under 35 USC § 103 as being unpatentable over Winning Retail in view of U.S. Patent No. 6,119,097 to Ibarra. This rejection is respectfully traversed.

The Ibarra Patent

Ibarra discloses a system for manually collecting data on how employees perform relative to department performance standards, based on employee problem-solving worksheets (abstract). An objective employee job performance standard is selected as a measure of an employee's job performance (Col. 2, lines 54 - 62). The employee is evaluated relative to standards information (Col. 6, lines 16-18). The standard for the employee is re-evaluated whenever the standard is not being met by the employee (Col. 7, line 54 - Col. 8, line 2). The standard is then replaced with a new standard which is selected to improve the employee's performance (Col. 8, lines 5 - 9).

The Claimed Invention is Patentably Distinguishable Over the Cited Documents

At the outset, the Applicants renew their traversal of Winning Retail as a prior art reference, as discussed more thoroughly above as regards the rejection under 35 USC § 102.

The Applicants' claimed invention is directed to a computer-implemented method and system for measuring and analyzing store performance data. Collected store data is analyzed to compute a synopsis of the performance of a subject, such as a store employee, under observation. An improvement hypothesis is developed which determines at least one recommended action, and the recommended action(s) is applied to the subject. A change in store performance as a result of the subject applying the recommended action(s) is then measured. In this iterative process, increased store performance and revenue can be identified in response to the applied recommended actions.

In contrast, Ibarra is directed to the limited system of improving an employee's performance as measured against a job performance standard, even if it is necessary to select a lowered standard to be applied to the employee to achieve compliance (Ibarra at abstract; Col. 4, line 58 - Col. 5, line 6; Col. 7, line 54 - Col. 8, line 9). The process of selecting the standard and measuring the employee's performance against the standard is completely manual, and the goal of the process is to enable an employee to meet the original or the modified performance standards (abstract; Col. 2, lines 48 - 65).

In item 10, the Office Action introduces the Ibarra reference to allegedly cure some of the admitted deficiencies of the Winning Retail reference. However, Ibarra fails to remedy any of the deficiencies of the Winning Retail as discussed above regarding claim 1. Further, contrary to the assertions of the Office Action, Ibarra is directed solely to a manual employee performance evaluation system and is completely silent regarding the collection or analyzing of any store sales activity data. In fact, the only data, or information, referenced in the cited portion of Ibarra is employee performance standards information, all of which is manually entered by a manager (Ibarra at Col. 6, lines 16 - 20). Also, the only improvement in performance is aimed at the employee, not the store (Ibarra at Col. 6, line 61 - Col. 7, line 7). Finally, a computer is involved only to the extent that standards, employee scores, and information are manually entered into a computer, which can then print reports or summaries (Ibarra at Col. 8, line 50 - Col. 9, line 20).

The Office Action asserts on pages 17 - 34 that it would have been obvious to one skilled in the art at the time of the invention that the system and method as taught by Winning Retail would have benefited from the teachings of Ibarra. However, whether or not the retail strategies of Winning Retail could be combined with the manual employee performance evaluation system of Ibarra is moot because any such combination would still fail to teach all the elements recited in the claims herein. Further, any such combination would be a simple, non-enabled and manual strategy for improving an employee's job performance in a retail environment. Such a strategy fails to even suggest, much less render obvious, the complete and integrated computer-implemented system and method recited herein for measuring and analyzing store activity transaction data for determining and applying recommended action(s) to a subject under observation, to be followed by measuring a change in store performance as a result of the subject applying the recommended action(s).

For example, the Office Action on pages 26 - 28 admits that Winning Retail fails to disclose the claim 60 element of "defining a set of recommended actions directed at improving store productivity as a function of skill proficiency and revenue generation" and then relies on Ibarra as allegedly teaching this feature. However, Ibarra is completely silent regarding defining a set of recommended actions directed at improving store productivity, much less actions to improve store productivity as a function of skill proficiency and revenue generation. Instead, Ibarra is expressly limited on its face to improving employee job performance: "identify and assign at least one objective activity to the employee which should enable the employee to meet the objective standards" (Ibarra at abstract); Performance Appraisal Summary (Ibarra at Fig. 6); "It is an object of the present invention to provide a method and apparatus for identification and tracking of human job performance factors." (Ibarra at Col. 2, lines 34 - 36). "It is another object to provide a method and apparatus for identification of objective activities which can be performed to thereby improve job performance." (Ibarra at Col. 2, lines 42 - 44).

The Office Action further takes official notice throughout pages 20 - 29 that various features recited in the claims are old and well known. The MPEP instructs the Patent Office that the taking of official notice is appropriate in only limited circumstances and should be used judiciously, not as a method for wholesale rejection of claim elements when no references can be

found to teach the claim elements, as has been done in the present Office Action. MPEP § 2144.03. Accordingly, the Applicants respectfully traverse the frequent use of official notice in the present Office Action and request that documentary evidence of the asserted “old and well known” practices be provided in the next Office Action.

For the reasons discussed above, Applicants respectfully submit that the Winning Retail/Ibarra combination fails to render obvious the features recited in claims 3 - 11, 19, 28 - 37, 39 - 40, and 60 - 72. Each of these claims is believed to be patentably distinguishable over Winning Retail and Ibarra, either taken alone or in combination; and it is respectfully requested that the rejection of claims 3 - 11, 19, 28 - 37, 39 - 40, and 60 - 72 be withdrawn.

Summary

It is submitted that none of the documents, either taken alone or in combination, teach the claimed invention. Thus, claims 1 - 11, 13 - 44, and 60 - 75 are deemed to be in a condition suitable for allowance. Reconsideration of the claims and an early Notice of Allowance are earnestly solicited.

Pursuant to 37 C.F.R. § 1.136(a)(3), Applicant hereby requests and authorizes the U.S. Patent and Trademark Office to (1) treat any concurrent or future reply that requires a petition for extension of time as incorporating a petition for extension of time for the appropriate length of time and (2) charge all required fees, including extension of time fees and fees under 37 C.F.R. §§ 1.16 and 1.17, to our Deposit Account No. 50-4047.


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If any fees are required in connection with this Amendment, please charge the same to our Deposit Account No. 50-4047.

Respectfully submitted,

BINGHAM MCCUTCHEN, L.L.P.

By: 
William N. Hargett
Reg. No. 44,481

2020 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 373-6158
Facsimile: (202) 373-6001

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